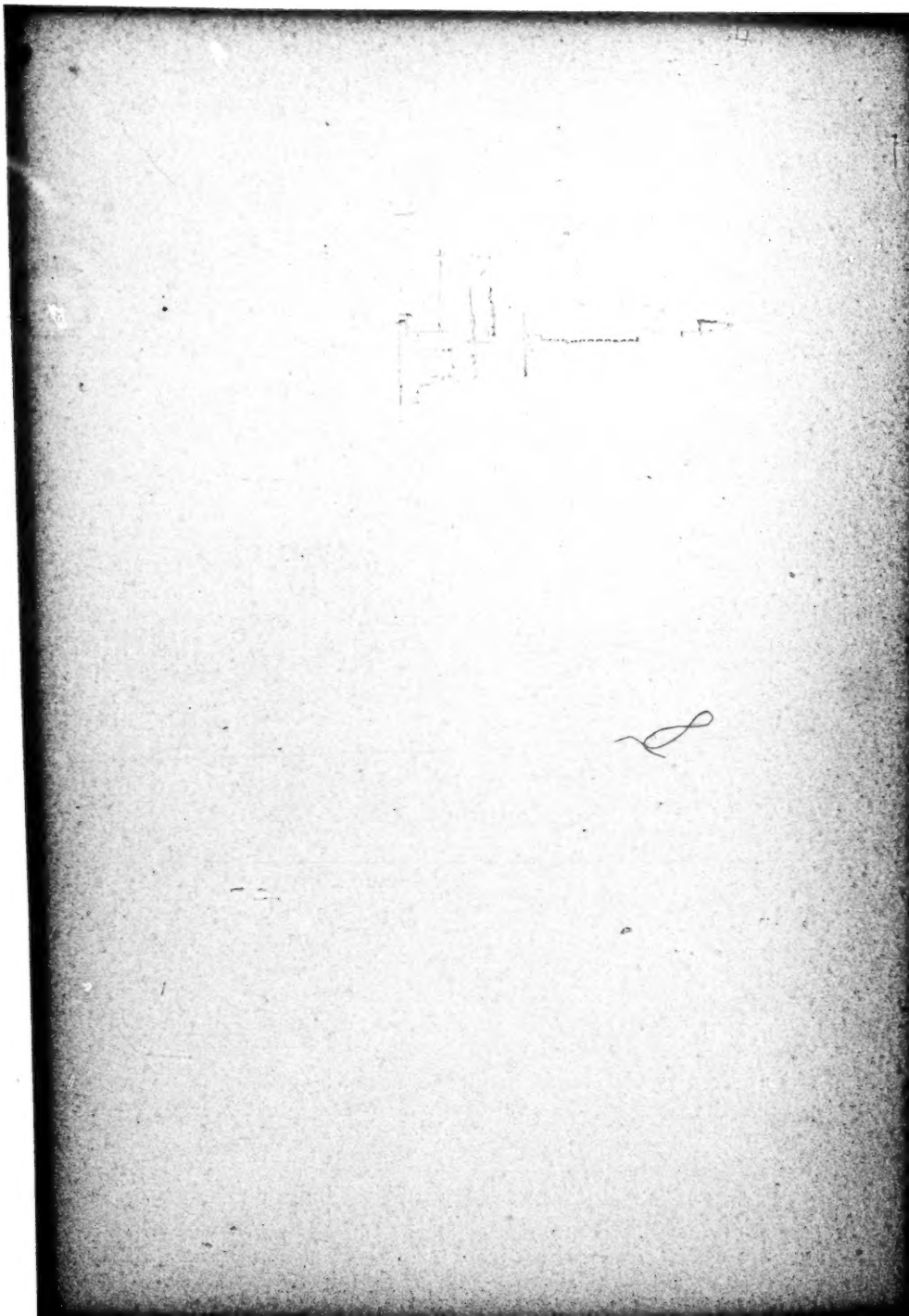

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1995

ALLEN F. BREED,

Petitioner,

v.

GARY STEVEN JONES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution is applicable to delinquency proceedings in juvenile court.

2. Whether respondent was twice placed in jeopardy in violation of his federal constitutional rights when he was tried and convicted in juvenile court, remanded by

the juvenile court to adult court, and there retried and reconvicted of the same offense for which he had previously been adjudged a delinquent.

STATEMENT OF THE CASE

On February 9, 1971 a petition was filed against respondent in the Superior Court of Los Angeles County, Juvenile Court. The petition alleged that respondent, a seventeen year-old minor, was a person described by section 602 of the California Welfare and Institutions Code[1] in that on or about February 8, 1971 he had committed acts which, if committed by an adult, would constitute the crime of armed robbery in violation of California Penal Code § 211 (App. 15-16). A detention hearing was conducted on February 10, 1971, at the conclusion of which the minor was ordered detained pending trial (App. 8).

The jurisdictional hearing, or trial, was conducted on March 1, 1971. After hearing testimony from two prosecution witnesses and respondent, the court found that the allegations in the petition were true, that the minor was a person described by Welfare and Institutions Code § 602, and sustained the petition. The court also ordered that the minor should remain detained at juvenile hall (App. 18).

At the hearing conducted on March 15, 1971, the court announced its intention, pursuant to Welfare and Institutions Code § 707, to find Jones unamenable to its rehabilitative facilities and to direct the district

[1] Hereafter cited as "W&I Code."

attorney to prosecute the minor under Penal Code § 211. Jones' counsel objected that he had assumed the purpose of the hearing was for determining disposition to the appropriate juvenile facility, and that he had not been notified that the court was considering transfer to adult court. The court continued the matter for one week (App. 20-27).

On March 22, 1971 respondent submitted written points and authorities challenging the contemplated procedure by which he would be retried in adult court for the same offense for which he had been adjudicated a person described by Welfare and Institutions Code § 602. The challenge was posited primarily upon double jeopardy, due process, and statutory grounds (App. 9). The probation officer assigned to respondent's case testified that she believed that Gary was immature and needed psychiatric care, and that his problems would not be met if he were considered unfit and treated as an adult (App. 22, 30). The court overruled Jones' legal objections, and ordered that he be prosecuted as an adult because he had committed three armed robberies (App. 33).

Respondent filed a petition for a writ of habeas corpus in the Juvenile Court of Los Angeles County raising the same double jeopardy claim later adjudicated in federal courts. The writ was heard by the presiding judge of the Los Angeles Juvenile Court who expressed doubt concerning the constitutionality of the challenged procedure:

> "I think you have pointed up enough so it would make one wonder whether the juvenile is not now, in the terms of Gault, again being treated worse than the adult. The fact that it is not

> double jeopardy, according to appellate cases does in a sense mean that the juvenile is being treated worse than an adult. The adult never has to go through these two proceedings." (App. 41).

Nevertheless, the court denied the writ:

> "... even though I have considerable doubt as to how fair it is to have the minor go all the way through or even just start a juvenile adjudication and then be able to send him over to adult court, I still would not declare the section unconstitutional. It is, I suppose, a question of quantum in part." (App. 42).

Subsequently, a petition for a writ of habeas corpus raising the same constitutional claim was filed in the California Court of Appeal, Second Appellate District. After initially staying the criminal prosecution, the court denied the petition in an opinion by Justice Kingsley which is reported at 17 Cal. App. 3d 704, 95 Cal. Rptr. 185.[2] A petition for hearing raising the same claims was filed in the Supreme Court of the State of California; on August 4, 1971, the petition was denied, Justice Peters dissenting (App. 46).

On August 23, 1971 a preliminary hearing was conducted before the Municipal Court of Los Angeles County. The hearing was held pursuant to a complaint charging Gary Steven Jones with having committed armed robbery on or about February 8, 1971. Appellant entered a plea of not guilty and a plea of once in jeopardy and once convicted, and submitted this latter plea in writing (App. 47). At the conclusion

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[2]The opinion is reprinted as Appendix C to petitioner's Petition for Writ of Certiorari.

of the hearing, respondent was remanded to Superior Court (App. 57).

On September 3, 1971 a felony information was filed against the minor charging him with robbery in violation of Penal Code § 211 (App. 58). Jones pleaded not guilty, and on September 29, 1971 the cause was submitted to the Superior Court of Los Angeles County on the transcript of the preliminary hearing (App. 59-60); respondent was convicted of violating Penal Code § 211 (App. 60). On October 20, 1971 the minor was committed by the Court to the California Youth Authority (App. 62-63).

On December 10, 1971 respondent filed a petition for a writ of habeas corpus before the United States District Court for the Central District of California. In his petition he again contended that he had been twice placed in jeopardy in violation of his federal constitutional rights (App. 7-13). The Attorney General filed a response, oral argument was held, and on May 5, 1972, the Court (Hon. Lawrence T. Lydick) filed a memorandum and order denying the writ.[3]

A timely notice of appeal was filed on June 5, 1972 (App. 115). On June 21, 1972 Judge Lydick denied Jones' application for a certificate of probable cause, but a subsequent application for a certificate of probable cause was granted by the Honorable Richard H. Chambers, Chief Judge of the Ninth Circuit Court of Appeals (App. 116-117).

On May 15, 1974 the Ninth Circuit issued its opinion reversing the judgment of the district court on the

[3] Reported as *Jones v. Breed*, 343 F. Supp. 690 (C.D. Cal. 1972); reproduced as Appendix B to petitioner's Petition for Writ of Certiorari.

ground that respondent had been twice placed in jeopardy in violation of his rights under the Fifth Amendment. The district court was ordered to issue a writ of habeas corpus directing the state court, within sixty days, to vacate the adult conviction of Jones, either releasing him or remanding him to the juvenile court for disposition.[4]

On June 18, 1974 Judge Wallace of the Ninth Circuit granted petitioner's application for a stay of mandate pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure (App. 126). On October 21, 1974 this Court granted the petition for writ of certiorari and respondent's motion to proceed *in forma pauperis*.

SUMMARY OF ARGUMENT

Gary Jones has been tried for the same armed robbery in both juvenile court and adult court. If Jones were placed in jeopardy at the adjudicatory stage of the delinquency proceeding, his later trial on a felony charge in adult court would constitute double jeopardy. Before this Court can determine whether jeopardy attached during the juvenile court proceedings, however, it is necessary for it to decide whether the double jeopardy clause is applicable at all to delinquency proceedings in juvenile court.

In the trilogy of *Gault-Winship-McKeiver*, this Court placed the burden upon the State to demonstrate why

[4] The opinion of the Ninth Circuit is reported as *Jones v. Breed*, 497 F.2d 1160 (9th Cir. 1974) and is reprinted as Appendix A to the Petition for Writ of Certiorari.

application of fundamental constitutional rights to the juvenile court would not result in a denial of fundamental fairness. In resolving this question, this Court has looked to four principal factors: (1) the underlying basis and rationale of the constitutional right as it applies to the juvenile court; (2) whether application of that right would undermine the distinctive quality of the juvenile court system; (3) recommendations contained in model acts and scholarly articles; and (4) the extent to which the right is already applicable in various jurisdictions. Under these criteria the double jeopardy guarantee is clearly applicable to juvenile delinquency proceedings.

The double jeopardy clause is of ancient origins, and the policies it embodies–protection against the anxiety, embarrassment, and expense of duplicate prosecutions–are as important to minors as they are to adults. Application of the double jeopardy clause to the juvenile court will actually enhance the fairness of such proceedings. Minors confronted by the possibility of duplicate trials for the same offense cannot feel they are being treated fairly, a factor which will undercut the likelihood of their successful rehabilitation.

This Court has frequently emphasized the importance of informality and intimacy to the juvenile court. However, minors who face the uncertainty of transfer for criminal prosecution will be advised by counsel not to admit their culpability to their juvenile probation officer. This will result in large numbers of unnecessary, contested jurisdictional hearings which will further formalize the juvenile court process and drain the court's limited resources.

If minors do talk freely to their probation officers, their admissions may, in many jurisdictions, be introduced against them if they are later transferred to adult court. Even if such admissions are technically inadmissible, the prosecution has discovered the thrust of the minor's defense. The fundamental unfairness of this procedure is evident since the minor is confronted with a choice between either divulging his defense or foregoing the opportunity to contest the transfer to adult court.

If the double jeopardy clause does apply in the transfer setting, it simply means that the fitness decision (whether to waive jurisdiction) must be reached prior to the commencement of the jurisdictional hearing. This will not impair the distinctive quality of the juvenile court system. Unlike the jury trial, the double jeopardy safeguard will have no effect at all upon the *nature* of the juvenile court adjudicatory hearing. Conducting the fitness hearing initially is favored in all of the model codes and statutes which address the issue, and by all except one of the juvenile court scholars and commentators who have written articles on this question. In addition, 19 of the 22 states which specifically require the fitness hearing to be conducted at a particular time adopt the procedure of holding the fitness hearing at the very outset of the juvenile court proceedings. This procedure is also favored by the California Supreme Court.

Once it is determined that the double jeopardy clause does apply to delinquency proceedings, this case is controlled by well-established principles of double jeopardy law. Jones was placed in jeopardy during his trials in juvenile and adult court, both of which resulted

in convictions. This follows from the axiomatic principles that the double jeopardy clause protects against duplicate prosecutions, not simply duplicate punishments, and against double convictions as well as double acquittals. In addition, Jones was in danger of being punished twice for the same offense since California permits criminal prosecution of a juvenile for the same offense for which he has been adjudicated a delinquent, even after he has served part of his commitment in a juvenile correctional institution.

The continuing jeopardy theory espoused by the California cases would sanction retrials where the initial prosecution did not culminate in a final disposition. This theory originated in a dissenting opinion by Justice Holmes which has never gained acceptance by a majority of this Court. It is inconsistent with the prohibition against duplicate and multiple trials and is contrary to numerous decisions by this Court which preclude subsequent prosecution once jeopardy has attached, irrespective of the finality of the initial adjudication. To the extent that the continuing jeopardy theory has any present vitality, it is limited to justifying the well-accepted exception to the double jeopardy rule which permits retrials following reversals on appeal.

ARGUMENT

I.

THIS COURT MUST REACH THE ISSUE OF WHETHER THE DOUBLE JEOPARDY CLAUSE APPLIES TO DELINQUENCY PROCEEDINGS IN JUVENILE COURT.

Gary Steven Jones has been tried twice for the same armed robbery. The first trial occurred in juvenile court and the second trial took place in adult court following the juvenile court's transfer of jurisdiction under Welfare and Institutions Code § 707. In this context the Ninth Circuit held below: "... the Fifth Amendment guarantee of double jeopardy is fully applicable to juvenile court proceedings."[5]

Petitioner asserts that since this case involves the determination of Jones' rights after he had been transferred to adult court, the *Gault-Winship-McKeiver* trilogy is not directly germane to the resolution of any issue raised in this case.[6] If this proposition is accepted, petitioner's reliance upon *McKeiver*, and his extensive arguments concerning the effect of the Ninth Circuit's ruling upon the functioning of the juvenile court would be misplaced. The concerns voiced by this Court in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), for the continued vitality of the juvenile court were pertinent to the issue of whether the jury trial requirement should be imposed upon delinquency proceedings in juvenile court. Unless the present case presents a similar

[5] 497 F.2d at 1165.

[6] Petitioner's Opening Brief, pp. 14-21.

issue with regard to the applicability of the double jeopardy clause to delinquency proceedings, it is immaterial whether any incidental burdens would be placed upon the juvenile court as a result of the Ninth Circuit's decision. A basic constitutional guarantee cannot be denied a defendant in a felony trial simply because his prior adjudication occurred in a juvenile court. See *Davis v. Alaska*, 94 S. Ct. 1105 (1974), where this Court held that the state's policy interest in protecting the confidentiality of juvenile court proceedings cannot require a defendant in a criminal case to yield his constitutional right to confrontation and cross-examination.[7]

Respondent believes that the impact of the Ninth Circuit's decision below upon the functioning of the juvenile court should be examined by this Court. But the ramifications of the decision are pertinent only to the issue of whether the double jeopardy clause applies at all to the adjudicatory stage of delinquency proceedings. This issue must be reached because unless Jones was placed in jeopardy in juvenile court, the

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[7]If this Court accepts petitioner's characterization of this case as solely involving the constitutional rights of a defendant in a criminal proceeding, it would be a denial of equal protection to deny respondent his double jeopardy protection because of the impact such a decision would have on the juvenile court. An invidious classification would be established between defendants in criminal proceedings who are transferred by the juvenile court and those who are not. See *Baxstrom v. Herold*, 383 U.S. 107 (1966). To create special exceptions to the normal rules of double deopardy would also result in an invidious classification since this Court has consistently warned against a "watered-down" implementation of " the individual guarantees of the Bill of Rights . . ." *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964).

jeopardy which unquestionably attached during the later criminal proceeding would not be a *double* jeopardy. To determine whether jeopardy attached at the adjudicatory stage of the juvenile court proceeding, it must be determined initially whether the double jeopardy clause of the Fifth Amendment is applicable at all to delinquency proceedings in juvenile court.[8]

Since the applicability of the double jeopardy clause to juvenile delinquency proceedings must be reached in this case, the reasoning of the *Gault-Winship-Mckeiver* trilogy is relevant. For this reason, respondent will

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[8] As petitioner's brief correctly notes, the double jeopardy issue may be raised in a variety of contexts involving the juvenile court. These include: (1) a retrial in juvenile court following a prior acquittal in the same court; (2) retrial in juvenile court following a prior conviction in the same court; (3) prosecution in adult court following a conviction in juvenile court; and (4) prosecution in adult court following a conviction in juvenile court and certification or transfer of the minor by the juvenile court. In this brief, respondent shall focus upon the policy reasons underlying the double jeopardy clause which apply specifically to situation four, *supra*, which is presented by the case at bar. However, it should be recognized that many of these policy grounds apply with equal pertinence to any duplicate prosecutions of a minor, irrespective of which courts conduct the trials, or whether the second trial follows a prior acquittal or conviction.

This Court has never sanctioned a divisible theory of double jeopardy; neither has it ever intimated that the *applicability* of the double jeopardy prohibition to a judicial proceeding would turn upon the nature of other judicial proceedings which might ensue. It is immaterial to the constitutional question of the applicability of the double jeopardy clause whether the delinquency proceeding in this case may be followed by a subsequent delinquency proceeding in juvenile court or by an adult criminal prosecution.

examine the practical impact upon the juvenile court process of applying and enforcing the double jeopardy prohibition. As will be demonstrated, implementation of this guarantee will not undermine the juvenile court's ability to function in a unique manner [see *McKeiver v. Pennsylvania*, 403 U.S. 528, 548 (1971)] but, rather, will enhance the "fundamental fairness" of the juvenile court process.

II.

THE DOUBLE JEOPARDY GUARANTEE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS APPLICABLE TO DELINQUENCY PROCEEDINGS IN JUVENILE COURT.

In the trilogy of *In re Gault*, 387 U.S. 1 (1967), *In re Winship*, 397 U.S. 358 (1970), and *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), this Court achieved a considerable constitutional domestication of the juvenile court while defining the structure within which to determine if other constitutional safeguards should be applied to the juvenile court process. The applicability of the double jeopardy prohibition was not explicitly discussed by the Court. However, since this Court has overruled *Palko v. Connecticut*, 302 U.S. 319 (1937), in *Benton v. Maryland*, 395 U.S. 784 (1969), and held that the double jeopardy clause of the Fifth Amendment is germane to state criminal proceedings, applicability of the double jeopardy protection to state juvenile court proceedings is ripe for decision. The aforementioned trilogy provide the framework for resolution of this issue.

In *In re Gault*, 387 U.S. 1 (1967), this Court held that a minor in a juvenile delinquency proceeding is protected by various provisions in the Bill of Rights. These include specifically: adequate notice of the charges against him, representation by counsel (including the right to court-appointed counsel if he is indigent), the right not to incriminate himself, and the right to confront and cross-examine adverse witnesses. Although the double jeopardy issue was not raised in *Gault, supra*, this Court did, in a footnote, intimate that retrial of a juvenile in adult court for the same offense for which the minor had been adjudicated a delinquent, and had served time under a juvenile court commitment, might constitute a denial of procedural due process.[9]

In *In re Winship*, 397 U.S. 358 (1970), this Court held that minors who are the subjects of delinquency proceedings are entitled to be tried in accordance with the criminal law standard of proof beyond a reasonable doubt. And in *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), this Court held that juveniles are not constitutionally entitled to trials by jury in delinquency proceedings.

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[9] "The impact of denying fundamental procedural due process to juveniles involved in 'delinquency' charges is dramatized by the following considerations. . . .(4) In some jurisdictions a juvenile may be subjected to criminal prosecution for the same offense for which he has served under a juvenile commitment. However, the Texas procedure to this effect has recently been held unconstitutional by a federal district court judge, in a habeas corpus action. *Sawyer v. Hauck*, 245 F. Supp. 55 (D.C.W.D. Tex. 1965)." *In re Gault*, 387 U.S. 1, 20-21 n.20 (1967).

Although the result in *McKeiver, supra*, differed from *Gault* and *Winship*, this turned upon distinctions in the constitutional rights under consideration, and their impact upon the juvenile court system, not upon underlying assumptions or modes of analysis. Indeed, the analytical underpinnings of *Gault* and *Winship* were left untouched by the pragmatic approach reflected in *McKeiver*.

First, this Court has uniformly agreed that constitutional rights shall not be denied minors in delinquency proceedings because traditionally these proceedings were considered civil rather than criminal. In *In re Gault*, 387 U.S. 1, 50 (1967), this Court termed the "civil" categorization a "feeble. . .label of convenience"; and in *McKeiver v. Pennsylvania*, 403 U.S. 528, 541 (1971), this Court rejected the civil-criminal dichotomy as "wooden." Likewise, this Court has refused to withhold constitutional safeguards from juveniles because the State is acting *parens patriae*. As the Court exhorted in *In re Winship*, 397 U.S. 358, 365-66 (1969):

> " . . . civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts." See also *In re Gault, supra*, at 18, 19.

Common to this Court's decisions has been the recognition that juvenile delinquency proceedings potentially result in severe deprivations of the minor's liberty[10] and are "comparable in seriousness to a felony

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[10]This is as true in California as it is in other states. Authorized dispositions in California include probation, foster care, placement in a juvenile home, ranch, camp of forestry camp, or commitment to the California Youth Authority. W&I

prosecution." See *In re Gault*, 387 U.S. 1, 27-28, 33 (1967). Constitutional safeguards have also been applied to the juvenile court because of the stigma associated with a juvenile court adjudication which, despite attempts at minimization, infects juvenile delinquency adjudications to almost as great an extent as criminal convictions. See *In re Winship*, 397 U.S. 358, 363 (1970); *In re Gault*, 387 U.S. 1, 23-25 and n.31 (1967); *T.N.G. v. Superior Court*, 4 Cal. 3d 767, 776 n.10, 94 Cal. Rptr. 813, 818 n.10 (1971).

Finally, this Court has consistently recognized that the juvenile court system has failed to live up to its idealistic goals of tender care and successful rehabilitation. Although not wishing to give impetus to the system's demise [*McKeiver v. Pennsylvania*, 403 U.S. 528, 551 (1971)], this Court has frequently voiced concern, shared by numerous scholars and juvenile court practitioners, that,

> " . . . the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative

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Code § § 725-731. Although the juvenile court may only assume jurisdiction over a minor who was under the age of eighteen when he committed the offense (W&I Code § 602), the court may retain jurisdiction over the minor until he attains age twenty-one. W&I Code § 607. Hence, every delinquent ward of the court in California potentially is within the juvenile court's jurisdiction for at least three years.

treatment postulated for children." *Kent v. United States*, 383 U.S. 541, 556 (1966)[11]

For these reasons, this Court has effectuated a constitutional domestication of the juvenile court. Nevertheless, this Court has rigorously opposed wholesale application of all Bill of Rights safeguards as urged by Justice Black in *In re Gault*, 387 U.S. 1 at 61. Instead, the Court has adopted an analysis which determines whether failure to apply a constitutional safeguard would result in a denial of "due process and fair treatment" [*In re Gault*, 387 U.S. 1 at 30 (1967)] or, as the Court stated in *McKeiver v. Pennsylvania*, 403

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[11]The concerns articulated by this Court have found expression with increasing frequency in judicial opinions finding conditions in juvenile correctional institutions cruel and unusual, barbaric, and inhumane. See, *e.g.*, *Morales v. Turman*, 383 F. Supp. 53 (E.D. Tex. 1974), [finding several institutions operated by the Texas Youth Council to be the scene of widespread psychological and physical brutality degrading to human dignity and violative of the Eighth Amendment's cruel and unusual punishment clause]; *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972) [conditions in juvenile institutions insidiously destructive of minors' humanity and violative of Eighth Amendment]; *Martarella v. Kelly*, 349 F. Supp. 575 (S.D.N.Y. 1972) [squalid, outdated, decayed and dilapidated institution for female PINS wards of juvenile court ordered closed because conditions considered cruel and unusual]; *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974), *cert. den.*, ____ U.S. ____ (1974) [Eighth Amendment violations found in Ohio juvenile institution where there were frequent "fraternity paddle beatings" and where potent tranquillizing drugs were administered without medical authorization]; *Lollis v. New York State Dept. of Social Services*, 322 F. Supp. 473 (S.D.N.Y 1970), *modified*, 328 F. Supp. 1115 (S.D.N.Y. 1971) [confinement of 14 year old girl in strip cell for two weeks without educational matter or recreational facilities constitutes cruel and unusual punishment].

U.S. 528 at 543 (1971), a denial of "fundamental fairness."

This approach necessarily involves a balancing of considerations. But for present purposes, it is important to note that the aforementioned factors—the potential for severe deprivation of liberty, the quasi-criminal aspects of a delinquency adjudication, the stigma associated with a finding of delinquency, and the now well-documented possibility that the minor may not only fail to receive solicitous care but may, in fact, be punished in a "cruel and unusual" manner—coalesce to place the burden upon the State to demonstrate why refusal to apply a fundamental constitutional right would not result in a denial of fundamental fairness. See Note, *The Supreme Court, 1969 Term*, 84 Harv. L. Rev. 1, 160 (1969); *In re Winship, supra*. In *In re Gault*, 387 U.S. 1 (1967), this Court emphasized that the fairness required in delinquency proceedings includes " . . . the appearance as well as the actuality of fairness . . . " because the essentials of due process may be more important in improving the juvenile's attitude towards rehabilitation than the goodwill and compassion of the court. *Id.* at 26. Both the trappings and essence of fairness must be present.

In determining whether these standards have been satisfied, this Court has in *Gault, Winship* and *McKeiver, supra*, looked to four principal factors: (1) the underlying basis and rationale of the constitutional right as it relates to the juvenile court; (2) whether application of that right would undermine the distinctive quality of the juvenile court system; (3) recommendations contained in model acts and scholarly articles dealing with the juvenile court; and (4) the

extent to which the right is already applicable in various states by statute or court decision. See Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 Wm. and Mary L. Rev. 266, 275 (1972). Applying these criteria to the present case, it will be demonstrated that application of the double jeopardy safeguard will promote the "fundamental fairness" to which juveniles are entitled as a matter of constitutional right.

A. The Double Jeopardy Prohibition Will Enhance the "Fundamental Fairness" of the Juvenile Court System as Well as the Court's Ability to Act in a Unique Manner.

It requires little citation to establish the fundamental importance of the prohibition against twice placing a person in jeopardy, or its ancient origins. The roots of the double jeopardy clause can be traced to Greek and Roman times, and the principle became established in the common law of England long before this Nation's independence. *Benton v. Maryland*. 395 U.S. 784, 795 (1969). Justice Black has noted that fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas in western civilization. *Bartkus v. Illinois*, 359 U.S. 121, 152 n.3 (1959) (dissenting). Citing numerous historical sources, Justice Black concluded, "Few principles have been more deeply 'rooted in the traditions and conscience of our people.'" *Id*. at 155. The extraordinary acceptance of this principle is demonstrated by the fact that today every State incorporates some form of the prohibition in its constitution or common law.

Sigler, *Double Jeopardy* 34 (1969). Unlike the right to a jury trial, the double jeopardy clause has been held applicable to all criminal proceedings and is fully retroactive. See *Price v. Georgia*, 398 U.S. 323, 330 n.9 (1970); *Ashe v. Swensen*, 397 U.S. 436, 437 n.1: *Waller v. Florida*, 397 U.S. 387, 391 n.2 (1970).

The language of the double jeopardy clause applies to all persons without exception; it draws no distinction between adults and minors:

> " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . " U.S. Const., Amend V

In view of the importance attached to this monumental bulwark of our liberty, it would indeed be surprising if the protection it affords were available to hardened criminals but not to children. See *In re Gault*, 387 U.S. 1, 47 (1967).

Perhaps the best statement of at least some of the policies promoted by the double jeopardy prohibition is contained in *Green v. United States*, 355 U.S. 184 (1957):

> "The underlying idea, one that is deeply engrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . " *Id.* at 187-88.

These policies apply with particular forcefulness to juveniles who are neither as sophisticated nor as able to resist the pressures exerted by the State as their more

mature and experienced adult counterparts. See *Haley v. Ohio*, 332 U.S. 596 (1948), and *Gallegos v. Colorado*, 370 U.S. 49 (1962), where this Court noted that particular care must be taken in determining the voluntariness of a juvenile's confession.

Under the procedure followed in the present case, Jones was unaware at the time of arrest that he would face a criminal prosecution. Indeed, the underlying assumption of both Jones and his counsel was that he would be tried as a juvenile and, if convicted, treated as a ward of the juvenile court.[12] In *Gault, supra*, this Court emphasized the need for the juvenile court to provide "the appearance as well as the actuality of fairness, impartiality and orderliness." 387 U.S. at 26. But the patent unfairness of reprosecuting a juvenile for the same offense for which he has previously been tried can rarely, if ever, be conducive to effective rehabilitation. See Carr, *The Effect of the Double Jeopardy Clause on Juvenile Court Proceedings*, 6 U.Tol.L.Rev. 1, 7 (1974); cf. *United States v. Candelaria*, 131 F. Supp. 797 (S.D. Cal. 1955). The appearance and actuality of fairness may, as this Court has recognized, be far more important to the juvenile's ultimate rehabilitation than the court's own good intentions. *In re Gault*, 387 U.S. 1, 26, citing Wheeler and Cottrell, *Juvenile Delinquency—Its Prevention and Control* 33 (Russell Sage Foundation 1966); Report of the President's Commission on

[12]Even at the fitness hearing Jones' attorney was still under the impression that Jones was to be treated as a ward of the juvenile court. When the court announced its intention to transfer jurisdiction to adult court, counsel expressed surprise and requested a continuance, which was granted (App. 20-27).

Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 85 (1967). Recent articles and studies conclusively attest to the singular importance in any rehabilitation program of the minor's subjective feelings that he has been treated fairly.[13] A minor confronted by the possibility of undergoing duplicate prosecutions which adult defendants, charged with the most serious offenses, will never have to face cannot feel that he is being treated even-handedly.

One of the hallmarks of the juvenile court system is its intimacy and informality [see *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971); *In re Gault*, 387 U.S. 1, 25 (1967)]. The juvenile court encourages minors to admit their transgressions and, hence, to avoid the necessity for a formal, adversary trial. If, however, the procedure utilized by the State in this case is sanctioned, the ability of the juvenile court to function in this unique manner will be severely impeded. See *Bryan v. Superior Court*, 7 Cal.3d 575, 586-589, 102 Cal. Rptr. 831 (1972), *cert. den.*, 410 U.S. 944 (1973); cf. *In re Paul T.*, 15 C.A. 3d 886, 93 Cal. Rptr. 510 (1971).

Any attorney worth his salt will advise his client not to cooperate with his juvenile probation officer because he will not know whether the minor may be later prosecuted as an adult. Indeed, this is the position

[13]See, *e.g.*, MacFaden, *Changing Concepts of Juvenile Justice*, 17 Crime and Delinquency 131 at 141 (1971); Lipsitt, *The Juvenile Offender's Perceptions*, 14 Crime and Delinquency 49 (1968); Wheeler, *Controlling Delinquents* at 153 and 187 (John Wiley and Sons 1968); Foster and Freed, *A Bill of Rights for Children*, VI Family Law Quarterly 343 at 353-354 (1972); Snyder, *The Impact of the Juvenile Court Hearing on the Child*, 17 Crime and Delinquency 180 (1971).

taken in the volume on juvenile court practice published by the educational arm of the California State Bar Association to advise lawyers how to handle cases in juvenile court.

> "As long as transfer is a serious possibility, the case must be handled on the assumption that it will be transferred, and the attorney should share information and permit his client to talk with the probation officer only to the same extent and in the same manner he would with the district attorney if the case had already been transferred." R. Boches and J. Goldfarb, *California Juvenile Court Practice* 17 at 124-125 (C.E.B. 1968).

Most juveniles confronted by serious charges will refuse to discuss their complicity with their juvenile probation officer because of uncertainty as to whether their cases will be transferred to adult court. Plea bargains will also be rendered difficult because if the minor is transferred, sentencing will occur in a forum outside of the jurisdiction or control of the juvenile probation officer and the juvenile court.

Unless the fitness hearing is conducted prior to the jurisdictional hearing, the minor will necessarily suffer the anxiety and insecurity from which the double jeopardy clause is intended to shield him. See *Green v. United States*, 355 U.S. 184, 187-188 (1957). In most cases he will refuse to admit his guilt, thereby forcing the court to waste valuable judicial resources on a thoroughly unnecessary trial. He will suffer the expense of a second trial which may drain the resources of his family, thus causing the minor additional embarrassment and even anguish.[14] If the juvenile court does

[14]Most juveniles do not have independent resources sufficient to remunerate counsel.

decide to transfer the minor to adult court, he will spend weeks or months in a juvenile hall or jail in which he will usually receive no rehabilitation.[15] In California the minor has no right to bail while awaiting his jurisdictional hearing.[16] By the time the jurisdictional hearing and the fitness hearing have been conducted, and the minor manages to have himself released from jail on bail, important witnesses and other evidence may have disappeared, thereby undermining his ability adequately to defend himself.

Perhaps even more significantly, conducting the jurisdictional hearing prior to the fitness determination presents the minor with an awesome Hobson's Choice he is ill equipped to handle. As one commentator has described his dilemma:

> "The minor is faced with a critical situation in which he must sacrifice one right—either his right to remain silent and not disclose defenses prior to trial or his right to present his case—in order to exercise another." Note, *Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Court*, 24 Stanford L. Rev. 874, 902 n.137 (1972).

If the minor remains silent at the adjudicatory hearing in juvenile court, he runs the risk of being convicted

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[15]See *Children in Custody, A Report on the Juvenile Detention and Correctional Facility Census of 1971*, U.S. Dept. of Justice, Law Enforcement Assistance Administration 13-16; Rosenheim, *Detention Facilities and Temporary Shelters in Child Caring*, 259-265 (Pappenport, Kilpatrick, & Roberts eds., 1973).

[16]*In re William M.*, 3 Cal.3d 16, 26 n.17, 89 Cal. Rptr. 33 (1970); W&I Code §§632, 635, 636. In any case in which the minor is charged with a serious offense, which would be a felony if he were an adult, he can be detained on the grounds that "...it is a matter of immediate and urgent necessity for the protection of such minor or the person or property of another ..." W&I Code §636.

even though innocent. There is also a very strong possibility that the probation department will consider the minor uncooperative and for that reason give him an unfavorable recommendation.[17]

If, on the other hand, the minor does testify at the jurisdictional hearing, he exposes himself to the possibility that his testimony may be used against him if he must later undergo a criminal proceeding.[18] Even where the minor's testimony is not admissible, the state has discovered the thrust of his defense. By enabling the prosecution to have a "trial-run," the likelihood of conviction has been enhanced. There will be no proportionate increment in the defendant's ability to resist the prosecutor's cases. Note, *Double Jeopardy*, 75 Yale L. J. 262, 280 n.125 (1965); *The Problems of Long*

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[17]The Presiding Judge of the Los Angeles Juvenile Court recognized the minor's quandary in the present case: "If he [the minor] doesn't open up there is of course the danger that the probation officer will find that he is so uncooperative that he cannot make a recommendation for the kind of treatment you [counsel] think he really should have . . ." (App. 38).

[18]29 states exclude use of evidence admitted in a juvenile court hearing in any other court. See, Carr, *The Effect of the Double Jeopardy Clause on Juvenile Court Proceedings*, 6 Tol. L. Rev. 1, 53 n.299. In addition, California excludes at the adult trial evidence of the minor's admissions to the juvenile court judge or probation officer. *Bryan v. Superior Court*, 7 Cal.3d 575, 587, 498 P.2d 1079, 1087 (1972). However, these provisions do not resolve the minor's dilemma because they may merely protect him against use of the previously admitted evidence to show the existence of a prior adjudication of delinquency. Carr, *supra*, at 53.

Criminal Trials, 34 F.R.D. 155, 161 (1964).[19] As the Ninth Circuit stated below:

> "The most heinous and despicable criminal is saved from such an invasion of his fundamental rights. Yet, if we adopt California's position, we approve having such a procedure applied to those of tender years. This offends our concepts of basic, even-handed fairness." 497 F.2d at 1168.

Many state courts do allow juvenile confessions to be admitted in adult court. Florida permits a juvenile confession to be admitted in adult court as long as it is not shown to be involuntary. *State v. Francois*, 117 So. 2d 492 (Fla. 1967), while Illinois authorizes introduction in adult court of confessions made by juveniles to the police or state's attorneys upon the theory that they are not officers of the juvenile court. *People v. Hester*, 39 Ill. 2d 489, 237 N.W. 2d 466 (1968). Other states permit introduction of juvenile confessions in adult proceedings as long as the juvenile is warned of the possibility of adult prosecution and intelligently and voluntarily waives his right to remain silent. *State v. Lloyd*, 212 N.W. 2d 671 (Minn. 1973); *Mitchell v. State*, 464 S.W.2d 307 (Tenn. Cr. App. 1971); *State v. Gullings*, 416 P.2d 311 (Ore. 1966).

But even in the jurisdictions which follow relatively progressive rules of admissibility, the minor's dilemma

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[19]Once again, the Presiding Judge of the Los Angeles Juvenile Court commented below about the unfairness of this procedure: "I must say that [making the juvenile's testimony at a jurisdictional hearing inadmissible in a criminal trial] doesn't impress me because if the minor admitted something in Juvenile Court and named his companions, nobody is going to eradicate from the minds of the district attorney or other people the information they obtained." (App. 41-42).

remains unabated. It is little solace to the child that he is informed that he *may* be transferred to criminal court at some later time. The mere possibility of transfer will frequently frighten him into a silence which will be construed to his detriment. Less frequently, he might admit his culpability only to find that the prior admonition he received indelibly identifies his admissions as "voluntary" and "intelligent."

Even the most hardened criminal is not exposed to this dilemma. He is under no compulsion to testify before the grand jury or at his preliminary hearing. He feels little pressure to reveal the thrust of his defense or the manner in which he will cross-examine the prosecution's witnesses. But a juvenile in Jones' position who chooses to exercise his right to remain silent may well be sacrificing his right to the relatively more tender care and regenerative treatment available through the juvenile court. By extracting a waiver of a fundamental right as a price for asserting another right, the State is placing the minor in an untenable position which cannot be equated with basic principles of fundamental fairness. See, *e.g.*, *Blackledge v. Perry*, 94 S. Ct. 2098 (1974); *Benton v. Maryland*, 395 U.S. 784, 811-812 (1969); *United States v. Jackson*, 390 U.S. 570 (1968); *Green v. United States*, 355 U.S. 184, 192 (1957).

Finally, it is important to recognize that California utilizes Welfare and Institutions Code § 707 to certify minors to adult court even after they have been committed to juvenile institutions and have begun to serve their terms of confinement. *Bryan v. Superior Court*, 7 Cal. 3d 575, 498 P.2d 1079 (1972), *cert. den.*, 410 U.S 944 (1973); see Welfare and Institutions Code

§§ 707, 780 and 1737.1. Although this precise procedure was not utilized in the present case, all minors in California who otherwise qualify for certification confront this possibility of transfer to adult court even after they have commenced their treatment programs. This procedure violates the double punishment part of the double jeopardy prohibition [*North Carolina v. Pearce*, 395 U.S. 711 (1969)] and permits juvenile institutional authorities to unilaterally usurp the juvenile court's dispositional authority. This occurs because if the Youth Authority returns a minor to the juvenile court pursuant to Welfare and Institutions Code §§ 780 and 1737.1, "the court shall direct the district attorney or other appropriate prosecuting officer to prosecute the person under the applicable criminal statute or ordinance. . . ." W&I Code § 707. Under § 707, and as a practical matter, the juvenile court is bound by the institution's decision to return the minor for certification.[20] And the Youth Authority's decision has been reached without any statutorily created safeguards. W&I Code §§ 780, 1737.1.

Under *McKeiver v. Pennsylvania, supra*, the State is required to demonstrate why the application of a fundamental constitutional safeguard would impair the juvenile court's ability to function in its specialized manner. Although not required to do so by the *McKeiver* decision, respondent has demonstrated that applying the double jeopardy clause in the present

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[20]W&I Code § 1737.1 also provides that if the minor is returned to juvenile court by the Youth Authority, ". . .said court may not recommit such person to the Youth Authority."

context will enhance the juvenile court's ability to act in its unique fashion and preserve the "fundamental fairness" of juvenile court processes.

B. Applying the Double Jeopardy Clause to the Juvenile Court Will Not Impair the Court's Ability to Function in a Unique Manner.

In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), this Court declined to impose a mandatory jury trial upon the juvenile court because it believed that imposition of the jury trial requirement would destroy the distinctive quality of the juvenile court system.

> "If the jury trial were to be injected into the juvenile court system, it would bring with it into that system the traditional delay, the formality and the clamor of the public adversary system and, possibly, the public trial." 403 U.S. at 541.

Unlike the jury trial requirement, application of the double jeopardy safeguard in the context of the present case would not sound the death knell to the juvenile court process. In fact, unlike the jury trial guarantee, it would not affect at all the *nature* of the proceeding by which the juvenile court determines whether the minor has committed an offense which brings him within the court's jurisdiction. Application of this constitutional safeguard would simply mean that once jeopardy attaches at a jurisdictional (W&I Code § 701) hearing, the minor may not be retried in either juvenile or adult

court absent a recognized exception to the double jeopardy prohibition.[21]

The only right being asserted by the State in this case is the right to conduct a fitness hearing (W&I Code § 707) after the juvenile court has concluded the jurisdictional hearing (W&I Code § 701).[22] The State's interest in this procedure is obviously far more limited than the interests at stake in *McKeiver, supra*, which this Court believed went to the very essence of the juvenile court process. 403 U.S. at 550-551. Indeed, it can be fairly asserted that the State's interest in ensuring that jurisdictional hearings be conducted prior to fitness determinations is negligible since the California Supreme Court has expressed its clear preference for the procedure which the Ninth Circuit found to be constitutionally mandated in the case at bar:

> "The usual practice as to a fitness hearing in many juvenile courts in this state is that followed in the

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[21] Applying the double jeopardy clause would also mean, more broadly, that once jeopardy attached at a jurisdictional hearing in a delinquency case, future adjudications of the minor in juvenile court for the same offense would be precluded. This position has been accepted by the California Supreme Court, at least where the jurisdictional hearing resulted in an acquittal. *Richard M. v. Superior Court*, 4 Cal.3d 370, 93 Cal. Rptr. 752 (1971).

[22] This result is authorized, although not required, by state statute. W&I Code § 707. The California Supreme Court has interpreted Welfare and Institutions Code § 707 to permit the fitness hearing to be held either before or following the jurisdictional hearing. *Bryan v. Superior Court*, 7 Cal.3d 575, 102 Cal. Rptr. 831 (1972); *Donald L. v. Superior Court*, 7 Cal.3d 592, 102 Cal. Rptr. 850 (1972).

case before us. A hearing on the issue is noticed and held before the jurisdictional hearing. This practice of deciding the issue of fitness at the very outset is recommended in the California Juvenile Court Benchbook (Cal. College of Trial Judges (1971) §10.4, pp. 190-191) and we commend it." *Donald L. v. Superior Court*, 7 Cal. 3d 592, 598, 102 Cal. Rptr. 850, 853 (1972).

The State of California is, ironically, asking this Court to rule that the double jeopardy clause is inapplicable to juvenile court proceedings so that it may perpetuate a practice which is not favored by the highest court in California. Presumably, the considerations advanced in petitioner's brief in favor of conducting the jurisdictional hearing prior to the fitness hearing were rejected by the California Supreme Court in *Donald L. v. Superior Court, supra*. The State's argument in this case turns *McKeiver* on its head. We shall now turn to the individual considerations raised by petitioner and discuss them *seriatim*.

1. In California a Fitness Hearing is Not a Dispositional Alternative.

The State argues that California should be permitted to retain the fitness hearing as a dispositional alternative. However, the California Juvenile Court Law does not enumerate transfer to adult court as a permissible dispositional alternative. The dispositional powers of the juvenile court are set forth in W&I Code §§ 725-741. Permissible dispositions in a delinquency case include probation (W&I Code § 725), foster care (W&I Code § 727), commitment to a juvenile home,

ranch, camp, or forestry camp (W&I Code § 730), or commitment to the California Youth Authority (W&I Code § 731). Transfer to adult court is not listed as a dispositional alternative.

Only three jurisdictions require that a finding of delinquency be made before transfer of the minor to adult court.[23] The great majority of jurisdictions either require or permit the fitness hearing to be conducted prior to the adjudicatory hearing.[24] Only the three aforementioned states will be forced to amend their statutes if Jones' position is sustained.

2. Fitness Hearings Concern a Minor's Amenability to the Treatment Facilities Available to the Juvenile Court—Not His Guilt or Innocence.

Petitioner equates fitness hearings with preliminary hearings in adult court and argues that as a result of the Ninth Circuit's decision, state courts will have to conduct two trials directed towards determining the minor's guilt. This argument reflects an inaccurate understanding of the nature and function of the fitness hearing both in California and other jurisdictions.

The sole criteria in California for determining whether a minor should be transferred for criminal prosecution are: (1) the minor must be at least sixteen years of age at the time of the alleged commission of the offense, (2) he must be charged with a violation of a criminal statute or ordinance, and (3) he must

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[23]Mass. Ann. Laws, Chap. 119 § 61 (1969); West Vir. Code Ann. 49-5-14 (1974); Alabama Code, Title 13 § 364 (1958).

[24]Notes 45-47, *infra.*

" . . . not be amenable to the care, treatment and training program available through the facilities of the juvenile court . . . " (W&I Code § 707).[25] California, like all jurisdictions except three,[26] does not require a finding as to the minor's guilt or delinquency before transfer is authorized.[27] In fact, the California Legislature has explicitly provided that, ". . . the offense, in itself, shall not be sufficient to support a finding that such person is not a fit and proper subject to be dealt with under the provisions of the Juvenile Court Law." W&I Code § 707. Certifications to adult court based solely upon the seriousness of the offense have been reversed by California appellate courts. See *Bruce M. v. Superior Court*, 270 C.A. 2d 566, 75 Cal. Rptr. 881 (1969).

The factors upon which an unsuitability finding is based are generally those which " . . . indicate a poor prognosis for rehabilitation. . . . " *People v. Smith*, 5

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[25]Most state fitness statutes contain similar standards. Some require a specific finding as to the minor's amenability to the juvenile court's treatment facilities. See Alabama Code, Title 13 § 364 (1958); Kansas Stat. Ann. 38-808(b) (1973); Ohio Rev. Code Ann. § 2151.26(A) (2) (Supp. 1973). A large number of state statutes contain provisions requiring the juvenile court to find that it would be in the best interests of either the child or the state, or both, in order for the minor to be transferred for criminal prosecution. See Rudstein, *Double Jeopardy in Juvenile Proceedings*, 14 Wm. and Mary L. Rev. 266, 298-299 and n.131 (1972).

[26]Cited in note 44, *infra*.

[27]A minority of eleven jurisdictions do require a finding as to probable cause to believe the child committed the offense before transfer of jurisdiction is sanctioned. Rudstein, *supra*, at 299 n.132.

Cal. 3d 313, 317, 96 Cal. Rptr. 13 (1971). The California Supreme Court has held that the only factor that a juvenile court "*must*" [emphasis in original] consider at the fitness hearing is the minor's behavior pattern as described in the probation officer's report. *Jimmy H. v. Superior Court*, 3 Cal. 3d 709, 714, 91 Cal. Rptr. 600 (1970). The court *may* also consider other factors, including the nature of the offense allegedly committed and the circumstances and details surrounding its commission; but these factors are relevant only to the pervasive issue of the minor's "amenability to treatment as a juvenile. . . ." *Id.* at 715-716.

Thus, requiring the fitness hearing to be conducted prior to the jurisdictional hearing will not result in duplicate trials directed towards determining the minor's guilt. In fact, where the minor has already been detained by the juvenile court, as would be true in most cases where certification is under consideration, a determination must, under state law, already have been reached at the detention hearing that there is probable cause to believe the minor has committed the offense alleged in the petition. *In re William M.*, 3 Cal. 3d 16, 28, 89 Cal. Rptr. 33 (1970). In all cases the child's guilt or innocence would be beyond the scope of the fitness hearing. Instead, the hearing will focus upon the minor's record, his performance in other rehabilitative programs, the availability and suitability of juvenile treatment resources, and the gravity of the offense insofar as it may indicate incorrigibility. See *Jimmy H. v. Superior Court, supra; Note, Rights and Rehabilitation in the Juvenile Courts*, 67 Col. L. Rev. 281, 315 (1967).

As any seasoned trial judge knows, a full-blown trial takes far more time than a hearing which is concerned with sentencing or disposition. Since the unfitness determination may be based upon hearsay [*Jimmy H. v. Superior Court, supra*], the prosecution's side of the fitness hearing will customarily consist of a previously prepared social study [W&I Code § 706]. The minor will then have the opportunity to cross-examine the probation officer and to present affirmative evidence relating to his amenability to the court's treatment resources. Regardless of when the fitness hearing is conducted, the minor will have a full opportunity to demonstrate why he should be retained within the juvenile court system. The relative brevity of the fitness hearing, compared to a trial, or the differences in functions between the two types of proceedings, cannot—as petitioner asserts[28] – be equated with any lack of fundamental fairness.

3. Cases Retained by the Juvenile Court Probably Will Have to be Reassigned to a Different Judge or Referee.

Respondent agrees with petitioner that in most cases where the juvenile court decides to retain jurisdiction over the minor, the jurisdictional hearing will have to be conducted by a different judge or referee than the one who presided at the fitness hearing. This is to ensure that the judge or referee will not be unduly influenced by legally irrelevant or incompetent in-

[28]Petitioner's Opening Brief, pp. 44-45.

formation in resolving the jurisdictional issue. *In re Gladys R.*, 1 Cal. 3d 855, 83 Cal. Rptr. 671 (1970).[29]

The necessity for reassigning the case to a new judge or referee was specifically considered in *Donald L. v. Superior Court*, 7 Cal. 3d 592, 102 Cal. Rptr. 850 (1972), a case decided prior to *In re Michael V., supra*. The California Supreme Court there held that where jurisdiction is retained, the case should be heard by a different judge or referee. *Id.* at 853. Despite some administrative inconvenience, the Court noted that conducting the fitness hearing first is the preferred practice. *Ibid.* We suggest that the impact of this procedure upon the administration of the juvenile court is uniquely within the competence of the state courts, and that great deference should be given a determination in this regard by California's highest tribunal.

It is true that it would be more efficient for a single judge to handle these cases. Some administrative inconvenience will be experienced, especially in those rural counties which only have one superior court

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[29]In California this conclusion is open to question under the recent decision of the California Supreme Court in *In re Michael V.*, 10 Cal.3d 676, 111 Cal. Rptr. 681 (1974). In that case, the Court held that the judge's reliance upon the probation report at the jurisdictional hearing is not error if the probation officer who prepared the report is available for cross-examination. *Id.* at 683. Presumably, cases retained by the juvenile court after a fitness determination may not have to be assigned to a different judge if the probation officer is available for cross-examination.

Respondent believes that the better view is reflected by *Gladys R., supra*, because the right to cross-examine the probation officer will not adequately protect the minor against the court's reliance upon hearsay or prejudicial or incompetent evidence.

judge.[30] As this Court has repeatedly emphasized, however, constitutional rights are not to be sacrificed upon the altar of speed, convenience, or efficiency.

> "Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley v. Illinois*, 405 U.S. 654, 656 (1972).

4. The Thoroughness of the Fitness Hearing is not Determined by Its Timing.

Petitioner suggests that one result of conducting the fitness hearing prior to the jurisdictional hearing will be the absence of an adequate "investigation."[31] If petitioner is referring to an investigation into the minor's guilt, this consideration is, as previously noted, irrelevant in all except three jurisdictions. If petitioner is, rather, focusing upon the minor's amenability to facilities and programs available to the juvenile court,

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[30]The juvenile court in California is a branch of the superior court. W&I Code § 550. It is a simple matter, therefore, for any superior court judge to sit in juvenile court, and juvenile court matters are frequently heard by superior court judges – particularly where there is only one juvenile court judge and he has been disqualified, is ill, or is otherwise unavailable.

[31]Petitioner's Opening Brief, p.44.

there is no reason why a thorough investigation of these matters cannot be made prior to the fitness determination. As one state court has recognized,

> "[I]f a county attorney is causing juvenile cases to be investigated properly. . . . he will know in advance whether he desires to prosecute criminally and he can so move the court at or before the outset of the [jurisdictional] hearing. He has available the investigative facilities of the probation officer, the law enforcement officers, and the social services staff." *State v. Halverson*, 192 N.W. 2d 765, 769 (S. Ct. Iowa 1971).

Pursuant to *Donald L. v. Superior Court*, 7 Cal. 3d 592, 102 Cal. Rptr. 850 (1972), the vast majority of fitness hearings in California are conducted prior to the jurisdictional hearing. 19 of the 22 states which specify by legislation or judicial decision when the fitness hearing must be held require that the fitness hearing be conducted prior to the jurisdictional hearing.[32] If a state wishes to incorporate a probable cause requirement into its transfer procedure, it is, of course, free to do so; but most states, like California, have declined to impose such a rule.[33] The collective experience of most American jurisdictions refutes petitioner's contention that the practice favored by the California Supreme Court in *Donald L. v. Superior Court, supra*, results in any unfairness to the juvenile.

Petitioner notes that there were 14,094 delinquency petitions filed in Los Angeles County in 1972 which were processed by five juvenile court judges and

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[32]Notes 45 and 46, *infra*.

[33]Note 48, *infra*.

twenty-four commissioners sitting as referees.[34] It should be recognized, however, that in very few of these cases was transfer to adult court even a possibility. The criteria for transfer under Welfare and Institutions Code § 707 are stringent,[35] and transfer will not be considered unless the standards enumerated therein have been satisfied. These include a determination that the minor is unamenable to the entire range of rehabilitative programs and facilities available to the juvenile court (W&I Code § 707). For these reasons, only 509 out of 49,788 delinquency cases in California, or 2.1%, were remanded to adult court in 1972,[36] the last year for which statistics are available.

No increase in judicial manpower will be required if fitness hearings are conducted prior to jurisdictional hearings in all cases. As previously discussed, more minors will admit their guilt, thereby obviating the necessity for jurisdictional hearings. Where cases are transferred to adult court, a thoroughly unnecessary jurisdictional hearing in juvenile court will have been avoided. Even where jurisdiction is retained, the dispositional hearing will be primarily concerned with the same evidence which will have been introduced previously at the fitness hearing. Hence, it is to be anticipated that in these cases only an abbreviated dispositional hearing will be necessary.

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[34] Petitioner's Opening Brief, p. 41.

[35] See discussion at pp. 32-34, *supra.*

[36] *Crime and Delinquency in California*, Table 13 at 52 (Bureau of Criminal Statistics 1972).

C. The Clear Weight of Authority Favors Conducting the Fitness Hearing Prior to the Adjudicatory Hearing, Both as a Preferred State Practice and a Constitutionally Required Rule.

1. Applicability of the Double Jeopardy Clause

Prior to the decisions of this Court in *Benton v. Maryland*, 395 U.S. 784 (1969), and *In re Gault*, 387 U.S. 1 (1967), state courts typically held that the double jeopardy clause of the Fifth Amendment was not applicable to delinquency proceedings. These cases were generally premised upon one of two assumptions: (1) Minors in delinquency proceedings were not protected by the Bill of Rights because said proceedings were considered "civil" and (2) the issue was foreclosed because the double jeopardy prohibition had not been held applicable to state court proceedings.[37] *Gault* and *Benton* undermined the rationale of these decisions, and since 1968 the overwhelming majority of cases[38] and

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[37]See, *e.g.*, *People v. Silverstein*, 121 C.A.2d 140, 262 P.2d 656 (1953); *Moquin v. State*, 216 Md. 524, 140 A.2d 914 (1958); *In re Santillanes*, 47 N.M. 140, 138 P.2d 503 (1943).

[38]*State v. Gibbs*, 94 Idaho 908, 500 P.2d 209 (1972); *State v. Jackson*, 503 S.W.2d 185 (S. Ct. of Tenn. 1973); *People in Interest of P.L.V.*, 176 Col. 342, 490 P.2d 685 (1971); *Richard M. v. Superior Court*, 4 Cal.3d 370, 93 Cal. Rptr. 752 (1971); *Toliver v. Judges of the Family Court*, 59 Misc.2d 104 (N.Y. Fam. Ct. 1969); *Anonymous v. Superior Court*, 10 Ariz. App. 956, 959, 457 P.2d 956 (1969) (dictum); see also *In re Holmes*, 379 Pa. 599, 109 A.2d 523, 526 (S. Ct. of Pa. 1954) (dictum).

articles[39] adopt the view that the protection against twice being placed in jeopardy should be accorded minors in delinquency proceedings.

There has been a greater difference of opinion, at least among the courts, with regard to the implementation of the double jeopardy safeguard in the transfer of jurisdiction context. However, it is fallacious for petitioner to suggest[40] that the weight of authority favors transfer as a dispositional alternative. All of the model acts which address the issue, the great majority of scholarship in the field, and a majority of the court decisions outside of California clearly favor requiring the fitness hearing to be held prior to the adjudication of delinquency.

2. Model Statutes and Scholarly Articles

Recent model acts which specifically address the question unanimously recommend either that the fitness determination be reached prior to the commencement of the adjudicatory hearing, or that the minor not be reprosecuted in adult court for the same offense for which he was convicted as a juvenile. These include: *Model Rules for Juvenile Courts*, Rule 9 (Council of Judges of N.C.C.D., 1968); *Uniform Juvenile Court Act*, Sec. 34(a), 9 Uniform Laws Ann. 429 (master ed. 1973); *Family and Juvenile Court Acts* § 27 (U.S. Gov.

[39]See, *e.g.*, Comment: *Double Jeopardy and the Juvenile*, 11 Journal of Family Law 603 (1971); Note, *Double Jeopardy in Juvenile Justice*, 1971 Wash. L. Q. 702.

[40]Petitioner's Opening Brief, pp. 45-50.

Print. Office, Children's Bureau Publication No. 472, 1969); *Legislative Guide for Drafting Family and Juvenile Court Acts* § 27 (Dept. of H.E.W., Social and Rehabilitative Service, Children's Bureau Pub. No. 437, 1966); and the *California Juvenile Court Deskbook* § 104 at 148-150 (Cal. College of Trial Judges, 1972). No model act or statute advocates holding the jurisdictional hearing prior to the fitness hearing.

Both the *Standard Juvenile Court Act* § 13 (National Council on Crime and Delinquency in Cooperation with National Council of Juv. Ct. Judges and U.S. Children's Bureau, 6th Ed., 1959) and the *Standard Family Court Act* § 13 (Nat. Prob. and Parole Assn., 1969) prohibit a criminal prosecution based upon the same facts giving rise to the juvenile court petition "except as provided in this section." *Id.* Although this language is not entirely free from ambiguity, one of the chief draftsmen of both acts has indicated that it was not the intention to permit criminal prosecution of the juvenile for the same act for which the juvenile court had previously assumed jurisdiction. See, Sheridan, *Double Jeopardy and Waiver in Juvenile Delinquency Proceedings*, 23 Fed. Probation 43, 45 (Dec. 1959).

Respondent respectfully disagrees with petitioner's assessment that the Children's Bureau's recommendation concerning double jeopardy does not encompass the transfer situation. This contention is controverted by the language of Section 27 of the *Legislative Guide for Drafting Family and Juvenile Court Acts, supra,*

> "Criminal proceedings and other juvenile proceedings based upon the offense alleged in the petition or an offense based upon the same conduct is barred where the court has begun

> taking evidence or where the court has accepted a child's plea of guilty to the petition."

and by the draftsman's comment to this provision,

> "This section is new. It embodies traditional constitutional law concepts as to the time when jeopardy attaches. It is aimed at ensuring that no child will be prosecuted first as a juvenile and then later as an adult or in two juvenile court hearings for the same offense."

Petitioner's statement that the *Model Rules for Juvenile Courts* may reflect "cautious draftmanship" rather than "consideration of the better view"[41] is groundless speculation. As indicated in the brief *amicus curiae* submitted in this case by the Council of Judges of the National Council on Crime and Delinquency, Rule Nine does represent the Council's view of the preferred practice in terms of fairness to the juvenile.

Even if, *arguendo*, the *Standard Juvenile Court Act* does not specifically address the question before this Court, it is inaccurate to assert that there is any variance between Section 13 of the *Standard Juvenile Court Act* (1959) and Rule 9 of the *Model Rules for Juvenile Courts* (1969). Under the construction of the *Standard Juvenile Court Act* most favorable to petitioner, the *Act* would simply not apply to the transfer situation. But the *Model Rules for Juvenile Courts* were published ten years after the *Standard Juvenile Court Act* and clearly reflect the current position of the National Council on Crime and Delinquency.

The weight of scholarship also supports respondent's position. With the exception of Professor Carr,[42] all

[41] Petitioner's Opening Brief, p. 50.

[42] Carr, *The Effect of the Double Jeopardy Clause on Juvenile Proceedings*, 6 U. Tol. L. REv. 1 (1974).

other scholars and commentators agree that after jeopardy attaches in a delinquency proceeding, future prosecutions for the same offense in adult court are constitutionally precluded. Rudstein, *Double Jeopardy in Juvenile Proceedings,* 14 Wm. and Mary L. Rev. 266 (1972); Note, *Double Jeopardy and the Waiver of Jurisdiction in California's Juvenile Courts,* 24 Stan. L. Rev. 874 (1972); Antieau, *Constitutional Rights in Juvenile Courts,* 46 Cornell L. Q. 387, 397-398 (1961); see also Whitebread and Batey, *Juvenile Double Jeopardy,* ____ Illinois Law Forum ____.[43]

3. State Statutes

Only three states require a finding of delinquency before the minor may be transferred to adult court.[44] 17 states require by statute that the juvenile court determine the minor's fitness prior to commencement of the adjudicatory hearing.[45] Two other states have

[43]This article has been submitted for publication in the Spring, 1975 issue of the Illinois Law Forum. Copies of a draft version of the article have been lodged with this Court and sent to counsel for petitioner.

[44]Mass. Ann. Laws, Chap. 119 §61 (1969); West Vir. Code Ann. § 49-5-14 (1974); Alabama Code, Title 13 § 364 (1958).

[45]D.C. Code Ency. § 16,2307(d) (Supp. 1970); Georgia Code Ann. 24 A-2501(a) (Supp. 1974); Ill. Stat. Ann. ch. 37 § 702-7(3) (Supp. 1974); Md. Ann. Code art. 26 § 70-16(a) (1969); Mich. Stat. Ann. § 27.3178 (598.2) (2) (Supp. 1974); Minn. Stat. Ann. § 260.125 (1963); Miss. Code Ann. § 43-21-31 (1972); Mont. Rev. Code Ann. § 10-1229 (Supp. 1974); N.H. Rev. Stat. Ann. § 169.21 (1964); N.M. Stat. Ann. § 2A:448 (Supp. 1974); N.D. Cent. Code § 27-20-34 (1974); Okl. Stat. Ann., Title 10 § 1112(b) (Supp. 1973); Pa. Stat. Ann., Title 10 § 50-325(a)(4) (Supp. 1974); Tenn. Code Ann. § 37-234(a)(4)(i) (Supp. 1974); Texas Family Code § 54.02 (1973); Va. Code § 16.0-176(2) (Cum. Supp. 1974); Wyo. Stat. Ann. § 14-115 38 (Supp. 1971).

reached the same result by judicial decision.[46] Thus, 19 of the 22 states which have specifically addressed the issue require the fitness hearing to be held prior to the jurisdictional hearing.[47]

The statutes of a large number of states contain no requirement for a showing of criminal complicity prior to transfer.[48] In these jurisdictions adjudication prior to transfer is probably an infrequent occurrence.[49] The statutes of a number of other states require a finding of probable cause prior to transfer.[50] It would appear that the legislatures in these states have at least inferentially indicated that a finding of delinquency is unnecessary to support a transfer decision, although they have not prohibited this practice.

In *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), this Court noted with more than passing interest that at least 29 states and the District of Columbia deny the juvenile a right to a jury trial in delinquency cases, and that the same result had been achieved in five other states by judicial decision. *Id.* at 548-49. If this Court

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[46]*State v. Gibbs*, 94 Idaho 708, 500 P.2d 209 (1972); *State v. Halverson*, 192 N.W.2d 765 (S. Ct. Iowa 1971).

[47]Four states, Louisiana, Nebraska, New York, and Vermont, do not have a procedure for transferring jurisdiction from juvenile to adult court. Statutes in the remaining 24 states do not clearly specify when the transfer hearing must be conducted.

[48]Carr, *The Effect of the Double Jeopardy Clause on Juvenile Proceedings*, 6 U. Tol. L. Rev. 1, 58 n.325 (1974).

[49]*Id.* at 58.

[50]See, *e.g.*, Alaska Stat. § 47.10.060 (1971); Ariz. Rev. Stat. Ann. § 17, Juv. Ct. Rule 14 (1970); Fla. Stat. Ann. § 39.09(2)(a) (1974); Ky. Rev. Stat. Ann. §208.170 (1973); Me. Rev. Stat. Ann., Title 15 § 2611(3) (1964); N.C. Gen. Stat. § 7A-280 (1969); see also statutes listed in Carr, *supra*, 58-59 n.329.

had imposed a mandatory jury trial requirement upon the juvenile courts, it would have been overruling the laws of 35 jurisdictions. In the case at bar, however, only three states would be required to amend their statutes. More significantly, the procedure constitutionally mandated by the Ninth Circuit is in accord with the statutes of an overwhelming majority of jurisdictions which have legislated as to when the fitness hearing must be held. Information regarding customary practices in other states is incomplete, but it would appear that the practice of holding the fitness hearing initially is consistent with the practices and statutes in these jurisdictions.

4. Judicial Decisions

A number of federal and state courts have held that the federal constitutional prohibition against double jeopardy precludes the government from retrying a minor in adult court after jeopardy has attached at a jurisdictional hearing in juvenile court. *Fain v. Duff*, 488 F.2d 218 (5th Cir. 1973) (*en banc*), *petition for cert. filed* 43 U.S.L.W. 3035 (U.S. August 6, 1974); *Lewis v. Howard*, 374 F. Supp. 446 (W.D. Va. 1974), *rev'g Lewis v. Commonwealth*, 214 Va. 150, 198 S.E.2d 629 (1973); *State v. Gibbs*, 94 Idaho 908, 500 P.2d 209 (1972); *United States v. Dickerson*, 168 F. Supp. 889 (D.C.C. 1958), *rev'd on other grounds*, 271 F.2d 487 (D.C. Cir. 1959). In addition, several decision emanating from the state of Texas have held that it is a violation of fundamental fairness to convict minors as delinquents, hold them in custody until they attain

their age of majority, and then reprosecute them in adult court for the same offenses of which they had been previously adjudicated delinquents. *Hultin v. Beto*, 396 F.2d 216 (5th Cir. 1968); *Sawyer v. Hauck*, 245 F. Supp. 55 (W.D. Tex. 1965); *Garza v. State*, 369 S.W.2d 36 (Tex. Cr. App. 1963).[51]

Petitioner cites six cases in his brief which purportedly support his position.[52] The California cases, *Bryan v. Superior Court*, 7 Cal.3d 575, 102 Cal. Rptr. 831, *cert. den.*, 410 U.S. 944 (1973); and *In re Gary Steven J.*, 17 C.A.3d 704, 95 Cal. Rptr. 185 (1971), as well as *In Re Juvenile*, ____ Mass. ____, 306 N.E.2d 822 (1974), rest upon a continuing jeopardy theory which respondent believes is historically unsupportable and analytically incorrect. This theory will be discussed in part IV, *infra.*

The other three cases cited by petitioner are factually distinguishable and analytically inconsistent with decisions by this Court. In *Carter v. Murphy*, 465 S.W.2d 28 (Mo. Ct. App. 1971), the court held that double jeopardy does not apply to delinquency proceedings at all because such proceedings are not analogous to adversary criminal trials. This rationale is directly contradicted by this Court's decisions in *Gault* and *Winship, supra.*[53]

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[51]The courts relied upon a fundamental fairness rationale in these cases because this Court had not yet decided *Benton v. Maryland*, 395 U.S. 784 (1969), holding the double jeopardy clause applicable to state criminal proceedings.

[52]Petitioner's Opening Brief, p. 48.

[53]Unlike the present case, the minor in *Carter* had been transferred to adult court prior to the adjudication of delinquency.

In re Mack, 22 Ohio App.2d 201, 260 N.E.2d 619 (1970), is even more baldly inconsistent with this Court's jurisprudence since the court there rejected the double jeopardy defense because "[p]roceedings in Juvenile Court are civil in nature and not criminal." *Id.* at 621. The court's decision was also based upon a state statute which specified that transfers were limited to previously adjudicated delinquents. Ohio Rev. Code §21.51.26. Effective January 14, 1972 this statute was amended to permit transfer at any time prior to the order of final disposition. *Id.*, Rules Governing the Courts of Ohio, Rule 30(A).

Finally, *United States v. Dickerson*, 271 F.2d 487 (D.C.Cir. 1959), was decided pre-*Gault* and pre-*Benton v. Maryland*. The statement in *Dickerson* that the double jeopardy protection is inapplicable to criminal proceedings in state court is vitiated by these later decisions. In *Dickerson* the court never directly confronted the issue of whether jeopardy attached during the juvenile court proceeding. This is because the court found that the minor's admission of guilt occurred at a preliminary hearing,[54] was not a guilty plea, and was never accepted by the court as a guilty plea. 271 F.2d at 491. Since the court found that jeopardy had never attached during the proceeding in juvenile court, it was unnecessary for the court to decide whether the minor had been twice placed in jeopardy.

Under the standards articulated in *Gault*, *Winship*, and *McKeiver*, this Court must hold the double

[54]Jeopardy does not attach at a preliminary hearing in a criminal proceeding. *Collins v. Loisel*, 262 U.S. 426 (1923).

jeopardy protection applicable to delinquency proceedings in juvenile court. This conclusion, as well as its corollary that fitness proceedings must precede the adjudicatory stage of delinquency proceedings, is supported by the overwhelming majority of model codes, statutes, and juvenile court scholarship, and is consistent with the vast majority of state legislation. This result will elevate the fairness of juvenile proceedings so as to command the respect of the minor himself. To do less would be a disservice to the juvenile court's own cherished ideals and rehabilitative goals.

III.

RESPONDENT WAS TWICE PLACED IN JEOPARDY IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Once it is determined that the double jeopardy clause applies to delinquency proceedings, the result in this case is controlled by several well-established principles of double jeopardy law. First, the double jeopardy clause protects those who are convicted as well as those who are acquitted.[55] Second, a defendant is placed in jeopardy in a non-jury trial when he has been subjected to a charge before a court competent to try him, and

[55] *Helvering v. Mitchell*, 303 U.S. 391, 398 (1938); *United States v. Ball*, 163 U.S. 662, 669 (1896); *Patton v. North Carolina*, 381 F.2d 636, 644 (4th Cir. 1967), *cert. den.*, 390 U.S. 905 (1968).

that court has begun to hear evidence.[56] Third, a person is placed in jeopardy of life or limb when he is exposed to the risk of conviction and punishment.[57] The fourth principle is equally well-established but is contested by petitioner and, for that reason, requires discussion. It is that the double jeopardy clause protects a person against being tried twice for the same offense – not simply against the peril of a second punishment.

Petitioner contends that the protection afforded by the double jeopardy clause against multiple trials is only intended to implement a policy against multiple punishments. The logical thrust of this argument is that a defendant can be retried repeatedly for the same offense as long as multiple punishments cannot be imposed.

If this principle were embraced by this Court, the efficacy of the double jeopardy clause as a shield against abusive state power would be seriously impaired. The accused will suffer anxiety, embarrassment, and expense [see *Green v. United States*, 355 U.S. 184, 188 (1957)] as a result of duplicate or multiple prosecutions irrespective of whether a more severe penalty is, or can be, imposed. These multiple trials warp a defendant's life [see Note, *Double Jeopardy*, 75 Yale L.J. 262, 279 (1965)]. As Justice Brennan has stated,

> "Obviously separate prosecutions of the same criminal conduct can be far more effectively used

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[56] *United States v. Jorn*, 400 U.S. 470, 483 (1971); *Green v. United States*, 355 U.S. 184, 188 (1957).

[57] *Price v. Georgia*, 398 U.S. 323, 327 (1970); *Clawans v. Rives*, 104 F.2d 240, 242 n.4 (D.C. Cir. 1939).

by a prosecutor to harrass an accused than can the imposition of consecutive sentences for various aspects of that conduct." *Abbate v. United States*, 359 U.S. 187, 198-99 (1959) (dissenting opinion).

There is no basis historically for petitioner's claim that the double jeopardy clause was intended to protect the accused against multiple prosecutions only where there was the potential for multiple punishment:

> ". . . the plea of autrefois convict, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be . . . is a good plea in bar to an indictment." II *Blackstone's Commentaries*, sec. 379, 2571 (Jones ed. 1916).[58]

The maxim that a man should not be twice placed in jeopardy for the same offense was accepted in *Vaux*'s case, 4 Co. Rep. 44a, 45a, 76 Eng. Rep. 992, 993 (K.B. 1591), and was applied in *Wemyss v. Hopkins*, L.R. 10 Q.B. 378 (1875), which involved a prosecution for unlawful assault emanating from the same incident for which the defendant had been convicted of unlawful misconduct.

In America the double jeopardy clause, proposed by James Madison on June 8, 1789, clearly forbade duplicate trials for the same offense:

> "No person shall be subject, except in cases of impeachment, to more than one punishment *or* [emphasis supplied] trial for the same offense." Annals of Cong. 434 (1st Cong.).

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[58]Other commentaries are to the same effect. See *Hawkins' Pleas of the Crown*, ch. 36, 524 (London, 1824); Coke, *The Third Part of the Institutes of the Laws of England*, ch. 101, 214 (London 1809).

Eghart Benson of New York, Roger Sherman of Connecticut, and Theodore Sedgwick of Massachusetts led the opposition to this language only because it seemed to curtail the defendant's right to an appeal and a second trial if the first trial contained reversible error. Sigler, *Double Jeopardy, The Development of a Legal and Social Policy* 30 (Cornell U. 1969). The language of the double jeopardy clause was changed to accommodate their concerns, but Madison's original intention to preclude more than one trial for the same act was carried forward in the new language. *Id.* at 30-32.

Numerous decisions of this Court have subsequently echoed the statement in *United States v. Ball*, 163 U.S. 662, 669 (1896), that,

> "The prohibition [against double jeopardy] is not against being twice punished, but against twice being put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial."

See, *e.g.*, *Price v. Georgia*, 398 U.S. 323, 326 (1970); *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Downum v. United States*, 372 U.S. 734, 736 (1963); *Green v. United States*, 355 U.S. 184, 187, 203 (1957); *Kepner v. United States*, 195 U.S. 100 (1904); *In re Nielson*, 131 U.S. 176, 188 (1889). It is true, as petitioner suggests, that these cases did involve the potential for multiple punishment. But see *O'Clair v. United States*, 470 F.2d 1199 (1st Cir. 1972), *cert. den.*, 412 U.S. 921 (1973) [double jeopardy clause precludes imposition of two convictions for same offense even where concurrent sentences imposed]. This purported distinction, however, turns upon the anomaly that prosecutors will obviously have little

reason to seek a retrial where increased punishment is not a possibility. The rationale of the previously cited decisions clearly rests upon the prohibition against multiple trials, and not merely multiple punishments.

> "It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict and it was found upon a defective indictment. The protection is not, as the court below held, against the peril of second punishment, but against being again tried for the same offense." *Kepner v. United States*, 195 U.S. 100, 130 (1904).

Contrary to petitioner's contentions, *In re Nielson*, 131 U.S. 176 (1889), did not turn upon the fact that the defendant was sentenced to 125 days imprisonment after having served three months on his prior conviction for the same offense. In reversing defendant's second conviction, this Court did not mention the multiple punishments. Instead, this Court stated,

> ". . . where as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." 131 U.S. at 188.

In *Price v. Georgia*, 398 U.S. 323 (1970), this Court emphasized that the "twice put in jeopardy" language of the Constitution relates to a *potential* risk that an accused will be convicted of the same offense for which he was initially tried. *Id.* at 326. Because the clause protects against potential risks of conviction, this Court held that the state could not retry a defendant for murder after he had obtained a reversal of a

manslaughter conviction which had been entered upon a murder indictment. It was considered immaterial for double jeopardy purposes that the defendant had not been punished, or even convicted of murder, because the Constitution protects him against "a risk of conviction." *Id.* at 327.[59]

Under *Price*, *Jorn* and *Downum*, *supra*, Jones was clearly placed twice in jeopardy. He not only faced a potential risk of punishment during each of his trials, but, in fact, he has suffered the indignity of two convictions. Even if, as petitioner asserts, California's statutory scheme precludes the possibility of multiple punishment, Jones was placed in jeopardy during both the adjudicatory hearing in juvenile court and his trial in adult court.

It should be emphasized, however, that the California transfer scheme in fact authorizes multiple punishment in two distinct ways. First, Jones spent approximately six weeks in juvenile hall before he was found unfit to be treated as a juvenile (App. 15-30) solely because of the state's decision to put him through an unnecessary jurisdictional hearing in juvenile court. Under California law he did not receive any credit for this time towards his commitment to the California Youth Authority.

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[59]For the same reason this Court has held that the double jeopardy clause forbids duplicate trials for the same offense where the first trial has been improperly aborted by the prosecutor or the court. This result has been required even though the initial trial did not result in a conviction, and even where there was no indication that the defendant might actually suffer multiple punishments. *United States v. Jorn*, 400 U.S. 470 (1971); *Downum v. United States*, 372 U.S. 734 (1963); see, *Green v. United States*, 355 U.S. 184 (1957).

This constituted a more severe additional punishment than was suffered by the defendant in *Waller v. Florida*, 397 U.S. 387 (1970).[60]

Second the California fitness statute does, as previously noted,[61] authorize transfer of a delinquent minor to the criminal justice system even after he has served time in a juvenile institution. W&I Code §§707, 1737.1; *Bryan v. Superior Court*, 7 Cal.3d 575, 102 Cal. Rptr. 831 (1972), *cert. den.*, 410 U.S. 944 (1973). Minors tried in juvenile court who otherwise qualify for transfer confront the possibility of serving time in both juvenile and adult correctional institutions. *Id.* Since jeopardy is measured by the risk of conviction or punishment, and not by its actuality [see *Price v. Georgia, supra*], Jones clearly was exposed to the possibility of double punishment.

In the present case several of the basic tenets of double jeopardy law have been flouted. Jones has been tried twice in connection with the same incident. He has been twice convicted of the same, underlying offense. He has run the gauntlet of potentially severe double punishment. And he has served an additional six weeks in confinement which would have been avoided if he had been tried only once. Jones' case is a graphic

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[60]In *Waller* the defendant was convicted in both a municipal court and a state court in connection with the same incident. He was sentenced by the municipal court to 180 days in county jail. The state court sentenced him to a term of six months to five years but gave him credit for 170 of the 180 days sentence previously imposed. Hence, the defendant in *Waller* served an additional 10 days imprisonment as a result of his prior conviction, far less than respondent in the present case.

[61] pp. 27-28, *supra*.

illustration of double jeopardy in classic constitutional terms.

IV.

THE CONTINUING JEOPARDY THEORY SHOULD NOT BE EXTENDED BEYOND ITS PURPOSE IN ORDER TO SANCTION SUCCESSIVE TRIALS FOR THE SAME OFFENSE.

The only plausible legal theory which has been advanced to support petitioner's position is that the entire proceeding in juvenile and adult court involves a single, continuing jeopardy.

> "... assuming jeopardy attached during the preliminary juvenile proceeding, and further assuming all rights constitutionally assured to an adult accused of crime are to be enforced and made available to a juvenile, it is clear that no new jeopardy arose by the juvenile proceeding sending the case to the criminal court. Such transfer neither acquitted nor convicted and could not in any event represent a second trial for the same offense or more than a continuing jeopardy for a single offense." *Jones v. Breed*, 343 F. Supp. 690, 692 (C.D. Cal. 1972); see also *Bryan v. Superior Court, supra* at 583; *In re Gary Steven J.*, 17 C.A.3d 704, 710, 95 Cal. Rptr. 369 (1971); *In re Juvenile*, ____ Mass. ____, 306 N.E.2d 822, 829 (1974).

The continuing jeopardy theory strikes at the very heart of the prohibition against twice placing a person in jeopardy since it sanctions multiple trials for the

same offense as long as the initial jeopardy is "continuing." There is no way in which this interpretation of the double jeopardy clause can be reconciled with numerous decisions by this Court holding that the constitutional guarantee protects against multiple trials, and not merely against multiple punishments. *Note, supra*, 24 Stan. L. Rev. 874, 888 (1972), See, *e.g., Price v. Georgia*, 398 U.S. 323, 326 (1970); *Green v. United States*, 355 U.S. 184, 187 (1957); *In re Nielson*, 131 U.S. 176, 188 (1889).

The continuing jeopardy theory is analytically unsound because the decision as to whether there is a single, continuing jeopardy turns upon whether the initial proceeding resulted in a final disposition of the case. See, *e.g., In re Gary Steven J., supra*, at 710; *Jones v. Breed, supra*, at 692. The decisions applying the continuing jeopardy theory have misinterpreted the essence of the double jeopardy safeguard by insisting there must be an acquittal, a conviction, or some other "final" disposition before a second trial would be constitutionally forbidden. *Id.* Numerous decisions by this Court have held that once jeopardy attaches, a subsequent prosecution is prohibited irrespective of whether these initial proceedings culminate in "final" orders or judgments. See, *e.g., United States v. Jorn*, 400 U.S. 470 (1971); *Downum v. United States*, 372 U.S. 734 (1963); *Green v. United States, 355 U.S. 184 (1957)*. As long as the defendant is in peril of punishment, jeopardy attached; and a second prosecution for the same offense is barred.

The theory of continuing jeopardy was, apparently, first expounded in this country by Justice Holmes in his dissenting opinion in *Kepner v. United States*, 195

U.S. 100 (1904). In that case the defendant, a lawyer in the Philippine Islands,[62] was tried and acquitted of embezzlement. The People appealed pursuant to a Philippine statute, and the Supreme Court of the Philippine Islands reversed. On retrial the defendant was convicted and sentenced to imprisonment. A majority of this Court reversed, finding an infringement of the protection against double jeopardy.

> "The protection is not, as the court below held, against the peril of second punishment, but against being again tried for the same offense." *Id.* at 130.

In his dissenting opinion, Justice Holmes set forth his view of continuing jeopardy.[63] For present purposes, it is important to recognize that the continuing jeopardy theory expounded by Justice Holmes was rejected by a majority of the Court in *Kepner* and has never been embraced subsequently by a majority of this Court.

> "... he [Justice Holmes] did dissent from the holding in *Kepner* that the Government could not appeal an acquittal – on the ground that a new trial after an appeal by the Government was part of the continuing jeopardy rather than a second

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[62] Although the case was decided under a Philippine statute, the statute contained a double jeopardy clause almost identical to that found in the Fifth Amendment. This Court assumed that this clause was identical in meaning to the double jeopardy provision of the Bill of Rights. 195 U.S. at 124.

[63] "... it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same case, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everyone agrees that the principle, in its origin was a rule forbidding a trial in a new and independent case where a man has already been tried once. But there is no rule that a man may not be tried twice in the same case." *Id.* at 134.

jeopardy. But that contention has been consistently rejected by this Court." *Green v. United S tes*, 355 U.S. 184, 196 (1957).[64]

The continuing jeopardy theory, despite its uncertain analytical underpinnings, has played a small – but useful – role in a carefully delimited factual context. There has always been a recognized exception to the double jeopardy protection whereby the state has been permitted to reprosecute a defendant who obtains a reversal of his conviction on appeal. Formerly, most courts justified this practice by holding that the defendant had waived his right to plead former jeopardy to the new indictment by filing his notice of appeal. *Trono v. United States*, 199 U.S. 521 (1905); *Stroud v. United States*, 251 U.S. 15 (1919); *Howard v. United States*, 372 U.S. 294, 298 (9th Cir. 1967), *cert. den.*, 388 U.S. 915 (1967).

However, the waiver theory has consistently been subjected to criticism because it coerced surrender of the double jeopardy protection in order to assert one's right to appeal. This Court has found that it is a fiction to claim that by appealing his conviction a defendant "chooses" to waive his right not to be retried. *Green v. United States*, 355 U.S. 184, 192 (1957); *Benton v. Maryland*, 395 U.S. 784, 811, 812 (1969) (White, J., concurring); *Trono v. United States*, 199 U.S. 521, 539 (1905) (McKenna, J., dissenting). The waiver theory has been viewed increasingly as inconsistent with the notion that fundamental constitutional rights may only be

[64]In fact, Justice Black later states in the same opinion that Justice Holmes' continuing jeopardy theory has never actually been adhered to by any other justice of the Court. 355 U.S. at 197.

voluntarily and intelligently waived. Cf. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

Nevertheless, society retains its interest in retrying a defendant who obtains a reversal of his conviction on appeal. Such a result has been found to be in the best interests of the public, the courts, and even the defendant.

> "While different theories have been advanced to support the permissibility of retrial, of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implications of that principle for the sound administration of justice. Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to a conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest." *United States v. Tateo*, 377 U.S. 463, 466 (1964); see also *Benton v. Maryland*, 395 U.S. 784, 811-812 (1969) (White, J., concurring).

In order to vindicate these unquestionable societal interests, courts continue to permit retrials following reversals on appeal. With increasing frequency, however, this result has been justified by invoking a continuing

jeopardy theory, rather than the now discredited theory that the defendant has, by appealing his conviction, waived his rights. See, *e.g., Price v. Georgia,* 398 U.S. 323, 327 (1970); *Rivers v. Lucas,* 477 F.2d 199, 202 (6th Cir. 1973), *rev'd and remanded on other grounds,* 414 U.S. 896 (1973); *United States v. Berry,* 309 F.2d 311, 313 (7th Cir. 1962), *cert. den.,* 380 U.S. 957 (1965); *State v. Aus,* 105 Mont. 82, 69 P.2d 584 (1937). However, the continuing jeopardy theory has been strictly limited to the retrial following appeal situation. This Court has aptly noted,

> "... recognition that the defendant can be re-prosecuted for the same offense after successful appeal does not compel the conclusion that double jeopardy policies are confined to prevention of prosecutorial or judicial overreaching," *United States v. Jorn,* 400 U.S. 470, 484 (1971).

Although petitioner urges this Court to extend the continuing jeopardy theory beyond its original function, he does not cite a single criminal case in which this has been sanctioned. This is not surprising since Justice Holmes' advocacy of the continuing jeopardy theory in *Kepner, supra,* was strictly limited to the facts in that case where a statute authorized the government to appeal acquittals. Holmes also was critical of the waiver theory [195 U.S. at 135-136]; his holding was simply that, "... a statute may authorize an appeal by the Government from the decision by a magistrate to a higher court as well as an appeal by a prisoner." 195 U.S. at 136. Holmes indicated explicity that where there is no appeal by the state or defendant, the continuing jeopardy theory is inapplicable:

> "There is no doubt that the prisoner is in jeopardy at the trial before the magistrate [the first trial], and that a conviction or acquittal not appealed would be a bar to a second prosecution." *Id.*

Welfare and Institutions Code §707 requires that the juvenile court dismiss a delinquency petition before a minor may be prosecuted in adult court. The second prosecution of the minor occurs in a different court and is based upon a new pleading. As one commentator has stated,

> "When the juvenile court judge enters a finding of nonamenability and the juvenile petition is dismissed, subsequent criminal action is based on a new complaint alleging the same facts. Even under Holmes' formulation this would not be continuing jeopardy since each prosecution proceeds from the authority of a different complaint." Note, *supra*, 24 Stan. L. Rev. 874, 888 (1972).

Although petitioner is correct in pointing out that even a retrial following appellate reversal does not involve a *continuous* jeopardy,[65] this serves only to emphasize the chimerical nature of the continuing jeopardy theory.

Moreover, the continuing jeopardy theory is inconsistent with this Court's decisions in *Waller v. Florida*, 397 U.S. 387 (1970), and *Robinson v. Neil*, 409 U.S. 505 (1973). In those cases this Court held that a defendant cannot be tried twice for the same offense in two separate courts. Petitioner seeks to distinguish *Waller* upon the basis that there the felony indictment was sought to obtain a greater sentence than that imposed in municipal court.[66] But that is equally true in the

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[65] Petitioner's Opening Brief, p.32.

[66] *Id.*, p.34.

present case. As a ward of the juvenile court Jones could only be held until his twenty-first birthday (W&I Code §1769), whereas the crime of robbery is punishable in superior court by imprisonment from five years to life. Cal. Penal Code §213.

Petitioner urges that *Waller* can be distinguished because in that case there was no judicial decision bridging the gap between courts.[67] However, the double jeopardy clause is intended to protect defendants against multiple prosecutions. Its protective armor does not depend upon the identity of the person who sanctions the reprosecution. If a judge determines that a defendant should be continuously prosecuted for the same offense, his action is no more exempt from the double jeopardy prohibition than if the same action were initiated by the district attorney.[68]

Neither can it make any difference that an unconstitutional act is sanctioned by state statute. Under petitioner's analysis, a state could legislate that at the conclusion of every misdemeanor trial, the judge may, instead of imposing sentence, remand the defendant for a felony prosecution. This procedure, factually indistinguishable from the case at bar, is patently violative of the right not to be twice placed in jeopardy.

In applying constitutional guarantees to the juvenile court, this Court has assiduously avoided creating

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[67] *Id.*

[68] In most instances it is the district attorney who will ask the court to transfer the juvenile under W&I Code § 707. See, *e.g.*, *Donald L. v. Superior Court*, 7 Cal.3d 595, 102 Cal. Rptr. 850 (1972).

divergent standards for adults and minors. To sanction reprosecution for the same offense in this case would be to undermine the very essence of the double jeopardy prohibition. The imprecise underpinnings of the continuing jeopardy theory contain few, if any, inherent limitations. To sanction an extension of this amorphous doctrine beyond its original, well-defined parameters would invite adulteration of one of the most fundamental and hallowed protectors of human liberty.

CONCLUSION

For the above stated reasons, respondent Jones urges that the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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